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The Nonprofit Commercial Enterprise: A Vehicle for Foreign Investment

62 N.Y.L. SCH. L. REV. [•] (2017–2018)

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THE NONPROFIT COMMERCIAL ENTERPRISE: A VEHICLE FOR FOREIGN INVESTMENT

To say that an agency's knowledge cannot grow, and that an agency is prohibited from benefiting from its experience, is unreasonable.¹

I. INTRODUCTION: THE EB-5 PROGRAM

In 1990, Congress created the Fifth Preference, Employment-Based Immigrant Investor Program (“EB-5”), granting Green Cards² to foreign investors meeting certain investment and employment creation requirements.³ Fearing this unprecedented program would be viewed as a means for foreigners to “buy” a Green Card,⁴ Congress promoted EB-5 as a plan designed to stimulate the U.S. economy by creating jobs and infusing new capital into the country.⁵ Since its enactment, U.S. Citizenship and Immigration Services (USCIS) has approved over fifty thousand EB-5 investor petitions,⁶ almost thirty-seven thousand of which were approved since

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1. Izummi, 22 I. & N. Dec. 169, 196 (Bd. of Immigration Appeals July 13, 1998).
 2. A Permanent Resident Card, known as a Green Card, allows immigrants to live and work permanently in the United States. See *Green Card*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/greencard> (last updated Feb. 22, 2018).
 3. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).
 4. 135 CONG. REC. 14287 (1989) (statement of Sen. Dale Bumpers, D-AR) (“[T]he rich ought not to be able to buy their way into this country.”); see also Alana Semuels, *Should Congress Let Wealthy Foreigners Buy Green Cards?*, ATLANTIC (Sept. 21, 2015), <https://www.theatlantic.com/business/archive/2015/09/should-congress-let-wealthy-foreigners-buy-citizenship/406432/>.
 5. See *USCIS Policy Manual*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <https://www.uscis.gov/policymanual/Print/PolicyManual.html> (last updated Mar. 28, 2018) (“Congress created this employment-based fifth preference immigrant visa category (EB-5) to benefit the U.S. economy by providing an incentive for foreign capital investment that creates or preserves U.S. jobs.”); 135 CONG. REC. 14289 (1989) (statement of Sen. Phil Gramm, R-TX) (“We need to bring people to this country who . . . can help us create jobs, growth, and opportunity.”).
 6. See *USCIS Form I-526 Immigrant Petition by Alien Entrepreneur and Form I-829 Petition by Entrepreneur to Remove Conditions Performance Data by Fiscal Year (FY1991–FY2013, 3rd Quarter)*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 22, 2014), <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-526-immigrant-petition-alien-entrepreneur> (follow “USCIS Form I-526 Immigrant Petition by Alien Entrepreneur and Form I-829 Petition by Entrepreneur to Remove Conditions Performance Data by Fiscal Year (FY1991 - FY2013, 3rd Quarter) (PDF)”); *USCIS Form I-526 Immigrant Petition by Alien Entrepreneur (Fiscal Year 2017, 4th Qtr)*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Jan. 19, 2018), <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-526-immigrant-petition-alien-entrepreneur> (follow “USCIS Form I-526 Immigrant Petition by Alien Entrepreneur (Fiscal Year 2017, 4th Qtr) (PDF, 153 KB)”). Because immigrant investors’ families may immigrate with them, this number does not reflect the total number of persons who have immigrated through the program, but merely the number of *investors* who have had approved petitions. See AUDREY SINGER & CAMILLE GALDES, *IMPROVING THE EB-5 INVESTOR VISA PROGRAM: INTERNATIONAL FINANCING FOR U.S. REGIONAL ECONOMIC DEVELOPMENT* 8 (2014), https://www.brookings.edu/wp-content/uploads/2016/06/EB5_Report.pdf.

October 2013.⁷ Many have denounced this program as a failure.⁸ There have been several instances of fraud; the U.S. Securities and Exchange Commission (SEC) has indicted individuals and corporations for a range of crimes related to EB-5 schemes, including false statements, deceptive financial transactions, theft, and the unauthorized sale of securities.⁹ This Note focuses on a different aspect of the program, one that remains un-critiqued and rigid—that foreign applicants attempting to satisfy the EB-5 investment requirements may not make an investment in a nonprofit entity.

Congress created EB-5, the fifth preference employment-based immigration program,¹⁰ under the Immigration Act of 1990.¹¹ Both the statute and related

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7. *USCIS Form I-526 Immigrant Petition by Alien Entrepreneur (Fiscal Year 2017, 4th Qtr)*, *supra* note 6.
8. ERIC A. RUARK & ANIQA MOINUDDIN, FED’N FOR AM. IMMIGRATION REFORM, *SELLING AMERICA SHORT: THE FAILURE OF THE EB-5 VISA PROGRAM 1* (2012), https://fairus.org/sites/default/files/2017-08/FAIR-EB5-2012_rev.pdf (“Analysis of available data strongly suggest[s] that the failure rate has been very high, and that the economic benefits provided by the EB-5 program have been negligible, at best.”). The program, partially designed to bring funds to struggling areas of the country, has been scrutinized as benefitting wealthier areas instead. Eliot Brown, *Immigrant Investor Program for Poor Neighborhoods Benefits Rich Ones More, Study Shows*, WALL STREET J., <http://www.wsj.com/articles/immigrant-investor-program-for-poor-neighborhoods-benefits-rich-ones-more-study-shows-1476917304> (last updated Jan. 10, 2017, 9:39 AM). Additionally, critics have voiced concern over national security as international fugitives and individuals with possible ties to Chinese and Iranian intelligence have been linked to the program. Ron Nixon, *Investor Visa Program Is Up for Renewal Amid Signs of Misuse*, N.Y. TIMES, Sept. 12, 2016, at A16; Ron Nixon, *Scrutiny for Visa Program That Aids Foreign Investors*, N.Y. TIMES, Mar. 16, 2016, at A13.
9. *SEC Case Freezes Assets of Ski Resort Steeped in Fraudulent EB-5 Offerings*, U.S. SEC. & EXCH. COMMISSION, (Apr. 14, 2016), <https://www.sec.gov/news/pressrelease/2016-69.html>; *SEC Charges Unregistered Brokers in EB-5 Immigrant Investor Program*, U.S. SEC. & EXCH. COMMISSION (June 23, 2015), <https://www.sec.gov/news/pressrelease/2015-127.html>; *SEC Halts EB-5 Scheme Stealing Investors in Cancer Center*, U.S. SEC. & EXCH. COMMISSION (June 2, 2016), <https://www.sec.gov/news/pressrelease/2016-105.html>; *SEC: Lawyers Offered EB-5 Investments as Unregistered Brokers*, U.S. SEC. & EXCH. COMMISSION (Dec. 7, 2015) <https://www.sec.gov/news/pressrelease/2015-274.html>. If seeking investments for EB-5 projects, “[i]ndividuals and entities performing certain services and receiving commissions must be registered to legally operate as securities brokers . . .” *Id.*
10. A limited number of employment-based visas are made available each fiscal year. 8 U.S.C. §§ 1153(a)(2), (d)(1) (2018). The available visas are allocated among five preference categories. *Id.* §§ 1153(b)(1)–(5). EB-1 visas are available to immigrants who have extraordinary ability, are outstanding professors or researchers, or are multinational executives or managers. *Id.* §§ 1153(b)(1)(A)–(C). EB-2 visas are available to immigrants who have exceptional ability or are members of a profession holding an advanced degree. *Id.* § 1153(b)(2)(A). EB-3 visas are available to immigrants who are professionals, skilled workers, or other kind of workers, as defined by the statute. *Id.* §§ 1153(b)(3)(A)(i)–(iii). EB-4 visas are available to immigrants who are considered special immigrants, *id.* § 1153(b)(4) (referencing the definition of “special immigrant” from § 1101(a)(27)), such as broadcasters, *id.* § 1101(a)(27)(M), and religious workers, *id.* § 1101(a)(27)(C). EB-5 visas are available to certain immigrant entrepreneurs. *Id.* § 1153(b)(5)(A)(i). Each category receives a percentage of the overall limit on visas approved. *Id.* § 1153(b)(1), (b)(2)(A), (b)(3)(A), (b)(4), (b)(5)(A). Fifth preference investors, through the EB-5 program, receive up to 7.1% of all employment-based immigrant visas issued each year. *Id.* § 1153(b)(5)(A).
11. Immigration Act of 1990, Pub. L. No. 101-649, § 121, 104 Stat. 4978 (codified as amended at 8 U.S.C. § 1153(b)(5) (2018)).

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regulations govern EB-5 requirements.¹² To qualify for permanent residence pursuant to EB-5, investors must: prove the lawful source of their funds;¹³ invest¹⁴ the funds into a new commercial enterprise;¹⁵ and have managerial control over,¹⁶ or be a limited partner in,¹⁷ that enterprise.¹⁸ The funds must be used for job-creating purposes¹⁹ and placed “at risk for the purpose of generating a return on the capital placed at risk.”²⁰ Additionally, the new commercial enterprise must create²¹ ten full-time²² jobs for “qualifying employees.”²³ The minimum capital investment required is \$1 million.²⁴ However, this amount may be lowered to \$500,000²⁵ in the case of an investment in a new commercial enterprise creating jobs in a targeted employment area.²⁶

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12. See 8 U.S.C. § 1153(b)(5); 8 C.F.R. § 204.6 (2017); 8 C.F.R. § 216.6 (2017).
 13. See 8 C.F.R. § 204.6(e).
 14. *Id.* (explaining that “invest” means “to contribute capital” and “capital” generally means “cash”).
 15. 8 U.S.C. § 1153(b)(5)(A); 8 C.F.R. § 204.6(e), (h) (defining “commercial enterprise”).
 16. 8 C.F.R. § 204.6(j)(5). While beyond the scope of this Note, an *ultra vires* argument might be made that the addition of this criterion exceeds the power of USCIS, as no such requirement appears in the statute. See 8 U.S.C. § 1153(b)(5).
 17. 8 U.S.C. § 1153(b)(5)(A); 8 C.F.R. § 204.6(j)(1)(i), (5)(iii).
 18. For an in-depth description of the EB-5 program, see *EB-5 Adjudications Policy*, U.S. CITIZENSHIP & IMMGR. SERVICES (May 30, 2013), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/May/EB-5%20Adjudications%20PM%20%28Approved%20as%20final%205-30-13%29.pdf>.
 19. See *Izummi*, 22 I. & N. Dec. 169, 189 (Bd. of Immigration Appeals July 13, 1998) (denying an EB-5 petition, in part, because reserve funds were not available for purposes of job creation).
 20. 8 C.F.R. § 204.6(j)(2).
 21. In certain situations not relevant to this article, the requirement is that existing jobs be preserved rather than created. See 8 C.F.R. § 204.6(j)(4)(ii) (“To show that a new commercial enterprise which has been established through a capital investment in a troubled business meets the statutory employment creation requirement, the petition must be accompanied by evidence that the number of existing employees is being or will be maintained at no less than the pre-investment level for a period of at least two years.”).
 22. “Full-time” means at least thirty-five working hours per week. 8 U.S.C. § 1153(b)(5)(D); 8 C.F.R. § 204.6(e).
 23. 8 C.F.R. § 204.6(e) (“Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States . . .”). This definition does not include the investor, his family members, or any persons admitted pursuant to a nonimmigrant visa. *Id.*
 24. 8 U.S.C. § 1153(b)(5)(C)(i). Note that while the statute states that the amount may be increased “from time to time” by regulation, *id.*, the amount has never been increased. See 8 C.F.R. § 204.6(f). However, the Department of Homeland Security proposed to update the regulation and increase the standard minimum investment from \$1 million to \$1.8 million and increase the targeted employment area investment from \$500,000 to \$1.35 million. EB-5 Immigrant Investor Program Modernization, 82 Fed. Reg. 4738, 4739 (proposed Jan. 13, 2017) (to be codified at 8 C.F.R. §§ 204, 216).
 25. 8 U.S.C. § 1153(b)(5)(C)(ii); 8 C.F.R. § 204.6(f)(2).
 26. 8 U.S.C. § 1153(b)(5)(C)(ii). The statute states that “‘targeted employment area’ means, at the time of investment, a rural area or an area which has experienced high unemployment (of at least 150 percent of the national average rate).” 8 U.S.C. § 1153(b)(5)(B)(ii). In practice, virtually all EB-5 investments are

It is the position of USCIS—as well as some practitioners²⁷—that a nonprofit entity cannot qualify as a commercial enterprise. First, USCIS stated in the preamble to its EB-5 regulations that because nonprofits do not “fundamentally engage in commerce,” they are categorically not commercial enterprises.²⁸ Second, practitioners assert that the at-risk requirement cannot be satisfied if the investor has no expectation of monetary gain.²⁹ This Note contends that a nonprofit commercial enterprise complies with the statute and regulations, and the at-risk requirement, when read correctly, permits an EB-5 applicant to contribute funds, in a donative sense, to a nonprofit commercial enterprise with no expectation of reimbursement or pecuniary gain.

In addition, the managerial, investment, and job-creation requirements are each easily satisfied in the nonprofit context. The managerial requirement is met if the investor serves on the board of directors of a nonprofit entity. The investment requirement is met because to “invest” means “to contribute capital,”³⁰ and “capital” means, among other things, “cash.”³¹ Accordingly, under the plain language of the regulations, the investment requirement is that the applicant contribute cash (or any other enumerated form of capital) to the commercial enterprise.³² In other words, while it could be argued that a donative contribution does not meet the at-risk

in targeted employment areas and thus qualify for this reduction. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRANT INVESTOR PROGRAM: PROPOSED PROJECT INVESTMENTS IN TARGETED EMPLOYMENT AREAS 4 (2017), <https://www.gao.gov/assets/690/683231.pdf>; see also Natalie Rodriguez, *Projects in Big Cities Remain a Major Hitch in EB-5 Debate*, LAW360 (Nov. 13, 2015, 4:12 PM), <http://www.law360.com/articles/726128/projects-in-big-cities-remain-a-major-hitch-in-eb-5-debate>. For example, the U.S. Government Accountability Office estimates that in the final quarter of the 2015 federal fiscal year, ninety-nine percent of the all filed EB-5 petitions were based on projects in targeted employment areas. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra*.

27. See, e.g., Carolyn S. Lee, *The Meaning of “At Risk” in EB-5 Investment: 2014 Update*, in IMMIGRATION OPTIONS FOR INVESTORS & ENTREPRENEURS 329, 330 (Lincoln Stone et al. eds., 3d ed. 2014) (asserting that nonprofit entities cannot be commercial enterprises for purposes of EB-5, but citing no authority for the assertion); Leslie K. L. Thiele & Scott T. Decker, *Residence in the United States Through Investment: Reality or Chimera?*, 3 ALB. GOV'T L. REV. 103, 122 (2010) (“Investments in nonprofit enterprises . . . are also not considered . . . qualifying investments for investment purposes.”); Stephanie Torkian, Comment, *Where to, Mr. Warbucks?: A Comparative Analysis of the US and UK Investor Visa Programs*, 38 FORDHAM INT'L L.J. 1299, 1309 (2015) (“A new commercial enterprise does not include noncommercial activity, such as a nonprofit enterprise”). Stephen Yale-Loehr, an immigration law expert, suggested that the issue of whether a nonprofit may qualify as a commercial enterprise would best be solved by a statutory amendment; however, a statutory amendment is unnecessary. See Email from Stephen Yale-Loehr, Professor of Immigration Law Practice, Cornell Law School, to author (July 20, 2015, 10:13 AM) (on file with author).
28. Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,902 (Nov. 29, 1991).
29. See, e.g., Interview with Dillon R. Colucci, Guest EB-5 Immigration Law Lecturer, N.Y. Law Sch., in N.Y.C., N.Y. (Mar. 15, 2016); see also Lee, *supra* note 27, at 329–30.
30. *EB-5 Adjudications Policy*, *supra* note 18, at 4.
31. 8 C.F.R. § 204.6(e) (2017). Capital includes “cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur” *Id.*
32. *Id.*

requirement, it nonetheless clearly meets the investment requirement. Lastly, nonprofits, of course, employ workers, and therefore nothing proprietary to the nonprofit entity prohibits it from meeting the job-creation requirement. Thus, in the context of a nonprofit, the only EB-5 applicant requirements subject to debate are (1) whether a commercial enterprise has been established, and (2) whether the funds are at risk.

This Note contends that a foreign investor may obtain permanent residence through the EB-5 program by investing \$500,000 in a nonprofit entity, as a nonprofit entity should be considered a commercial enterprise within the meaning of the statute and regulations, and that a donative investment satisfies the at-risk requirement. Part II discusses why a nonprofit entity should be considered a commercial enterprise, examining the governing statute, regulations, and other areas of business immigration law that allow nonprofit participation. Part III assumes the acceptance of a nonprofit commercial enterprise and explores why an investor should be able to satisfy the at-risk requirement by contributing capital to the nonprofit commercial enterprise in exchange for a “Social Return on Investment” instead of a pecuniary return. Part III discusses a recent trend in state corporate law—the adoption of benefit corporation statutes. Part IV concludes this Note.

II. THE NONPROFIT COMMERCIAL ENTERPRISE³³

This section discusses why a nonprofit entity should qualify as a “commercial enterprise” within the meaning of the EB-5 statute and regulations. The statute requires the creation of a commercial enterprise, but does not define the term,³⁴ and the regulations do not address the issue of whether a nonprofit entity so qualifies.³⁵ However, the preamble to the final EB-5 regulations states: “Because not-for-profit entities do not fundamentally ‘engage in commerce,’ the Service³⁶ does not find the

33. In the context of EB-5 petitions, the “nonprofit commercial enterprise” is a term coined by the author. For the remainder of this article, I ask that the reader assume we have a nonprofit entity into which a potential EB-5 applicant wishes to contribute the requisite capital for the purpose of creating ten jobs for qualifying U.S. workers and of ultimately obtaining permanent residence. Further assume that this applicant wishes to contribute the capital by donating it—in other words, he has no expectation that the funds will be returned, nor any expectation of pecuniary gain.

34. 8 U.S.C. § 1153(b)(5)(A) (2018). The statute provides that:

Visas shall be made available, in a number not to exceed 7.1 percent of such worldwide level, to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise . . . (i) in which such alien has invested . . . or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and (ii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States

Id.

35. *See* 8 C.F.R. § 204.6.

36. The Immigration and Naturalization Service (now, “Legacy” INS) issued the first EB-5 regulations in 1991, before the agency was dissolved in 2003. *How Does the USCIS Differ From INS?*, U.S. CITIZENSHIP,

inclusion of such entities to be consistent with the statute.”³⁷ This statement is untrue as a matter of law³⁸ and is inconsistent with the regulations, which do not exclude nonprofit organizations.³⁹ Furthermore, preambles to agency regulations are not binding—they do not have the force of law.⁴⁰ Accordingly, the position taken by USCIS in the preamble is not dispositive, and the statute, the final regulations, and other areas of employment-based immigration law should be looked to for guidance on whether a nonprofit entity may constitute a commercial enterprise.

A. *The Statute*

First, as stated earlier, the statute does not define the term “commercial enterprise.”⁴¹ Second, the statute does not draw any distinction between for-profit and nonprofit entities.⁴² Third, the only text modifying the term “commercial enterprise” in the statute states that the commercial enterprise (1) must “benefit the United States economy and create full-time employment for not fewer than 10 [qualifying workers,]” and (2) includes a limited partnership.⁴³ Fourth, Congress entitled the EB-5 sub-section of the statute *Employment Creation*.⁴⁴ In reading the plain text of the statute,⁴⁵ it is clear that the statute’s drafters were concerned with job

<https://www.uscitizenship.info/articles/index.html%3Fp=3875.html> (last visited Apr. 1, 2018). Its functions are now carried out by USCIS, U.S. Immigration and Customs Enforcement, and U.S. Customs and Border Protection. *Id.*

37. Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,902 (Nov. 29, 1991). Two commenters advocated for the regulations to include nonprofits in the definition of “commercial enterprise.” *Id.* The agency did not elaborate on the reasoning of these commenters. *See id.*

38. *See* discussion *infra* Section II.C.

39. *See* 8 C.F.R. § 204.6.

40. Jodi M. Gross & Judi Abbott Curry, *The Federal Preemption Debate in Pharmaceutical Labeling Products Liability Actions*, 43 TORT TRIAL & INS. PRAC. L.J. 35, 37–38 (2007) (“[T]he preamble is not part of the promulgated rule but is instead an advisory opinion that is not definitively binding, merely expressing the [agency’s] interpretation of . . . its regulations.”); Leslie C. Kendrick, *FDA’s Regulation of Prescription Drug Labeling: A Role for Implied Preemption*, 62 FOOD & DRUG L.J. 227, 235 (2007) (“[P]reambles to regulatory rules, like legislative preambles, are not understood to have force of law.”); Cristina Rodriguez, Comment, *The FDA Preamble: A Backdoor to Federalization of Prescription Warning Labels?*, 41 J. MARSHALL L. REV. 161, 178 (2007) (noting that the preamble to agency regulations is not, itself, a regulation, and hence is merely persuasive authority); Kevin M. Stack, *The Interpretive Dimension of Seminole Rock*, 22 GEO. MASON L. REV. 669, 691 (2015) (“[P]reambles are not binding.”).

41. 8 U.S.C. § 1153(b)(5) (2018).

42. *See id.*

43. *Id.*

44. *Id.*

45. The modern method of statutory interpretation is “textually constrained purposivism.” Recent Case, *Employment Discrimination—Disparate Impact—Second Circuit Declines to Extend Ricci v. Destefano*, 125 HARV. L. REV. 1852, 1856 n.55 (2012) (citing John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 *passim* (2011)) (“Textually constrained purposivism has become increasingly common in statutory interpretation.”). When interpreting a statute, the reader starts with the text. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 409 (1993) (“The starting point in interpreting a statute is its language,

creation, but we cannot extrapolate from the text that the drafters intended for jobs to be created solely in for-profit entities.

Nothing in the legislative history of the statute evinces an intention to exclude nonprofit entities; the legislative history, however, is rich with language evidencing an intention to create jobs.⁴⁶ “Indeed, Congress specifically avoided constraining the business activities benefiting from EB-5 capital.”⁴⁷ Senator Paul Simon (D-IL) stated that “[a]s long as the employment goal is met, it is unnecessary to needlessly regulate the type of business—manufacturing service, retail, or the like—nor the character of the investment, [c]orporations, partnerships, proprietors—all legal types of business entities—are appropriate”⁴⁸ Thus, we can infer that the legislative purpose of the EB-5 program is to create jobs, and this purpose is not restricted by whether these jobs are created in nonprofit or for-profit entities. In other words, the statute’s

for ‘if the intent of Congress is clear, that is the end of the matter.’”) (citing *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984)); *see also* *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (“On a pure question of statutory construction, our first job is to try to determine congressional intent, using ‘traditional tools of statutory construction.’”). If—and only if—the text is silent or ambiguous, then legislative purpose and history may be looked at to interpret the text. *See* Manning, *supra*, at 163. Because the text of the EB-5 statute is silent as to whether the term “commercial enterprise” includes nonprofit entities, such a determination is perhaps appropriate for interpretation by regulation. *Chevron*, 467 U.S. at 842–44. The judiciary must reject administrative constructions contrary to clear legislative intent, but if the legislative intent is unclear, the question for the court becomes whether the agency’s position is based on a “permissible construction of the statute.” *Id.* at 843. The foregoing notwithstanding, the USCIS interpretation is contrary to the legislative purpose of the statute. *See id.* at 843–44.

46. *See, e.g.*, 135 CONG. REC. 14561 (1989) (statement of Sen. Rudy Boschwitz, R-MN) (“The amended investor provision could therefore be used to create at least 68,000 new jobs—many of them in rural America.”); *Immigration Reform: Hearing on S. 358 and S. 448 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 101-607, 114 (1989) (statement of Sen. Alan Simpson, R-CO) (“We provide . . . additional . . . visas for immigrant investors to create jobs.”). The author also notes Senator Bumpers’ skepticism of EB-5’s job-creating abilities. Specifically, Senator Dale Bumpers said that no 4,800 foreign nationals would want to pursue EB-5 visas, and therefore, the Committee’s projection that 48,000 new jobs were to be created by the program annually was unrealistic. 135 CONG. REC. 14288 (1989). He stated, “I will stand on my head on the dome of the Capitol on December 31 every year and wiggle my ears if that happens.” *Id.* Fortunately for the Senator, he left Congress in 1999, prior to the large jump in EB-5 demand in 2010. Eugene Scott, *Dale Bumpers, Former U.S. Senator & Arkansas Governor, Dead at 90*, CNN, <http://www.cnn.com/2016/01/02/politics/dale-bumpers-arkansas-governor-senator/index.html> (last updated Jan. 2, 2016, 6:19 PM); *Part 3: Demand for EB-5 Visas*, NAT’L IMMIGR. F.: BLOG (Sept. 3, 2015), <http://immigrationforum.org/blog/part-3-demand-for-eb-5-visas/>.

47. Lee, *supra* note 27, at 331.

48. 136 CONG. REC. 35615 (1990). The regulations explain that the term “commercial enterprise” includes other entities not listed in the regulation, “which may be publicly or privately owned.” 8 C.F.R. § 204.6(e) (2017). As a matter of jurisprudential theory, a nonprofit is publicly owned. Greg McRay, *Who Really Owns a Nonprofit?*, FOUND. GROUP: CEO’S BLOG (Sept. 1, 2015), <http://www.501c3.org/who-really-owns-a-nonprofit/> (“The nonprofit organization is not ‘owned’ by the person or persons that started it. It is a public organization that belongs to the public at-large.”). The regulation does not except any type of *entity*, but only “noncommercial activity.” 8 C.F.R. § 204.6(e). Therefore, the phrase “or other entity which may be publicly or privately owned,” *id.*, is inclusive rather than exclusive and should be interpreted to encompass all plausibly included entity types.

job-creating purpose overrides any congressional desire for these jobs to be created in the for-profit sector.

In the United States, the nonprofit sector employs over eleven million workers.⁴⁹ This accounts for over ten percent of all private sector employment.⁵⁰ In New York, nonprofit employment accounts for over eighteen percent of private sector employment,⁵¹ and in the District of Columbia, over twenty-six percent.⁵² A study conducted by the Bureau of Labor Statistics found that nonprofit employment increased in each year of the study, from 2007–2012—even during the economic recession.⁵³

B. *The Regulations*

The legislative history of the regulations does not reveal that USCIS considered any evidence indicating that investments in nonprofit entities would not result in job creation.⁵⁴ To the contrary, USCIS bases its position merely on the fact that nonprofits do not engage in commerce.⁵⁵ The regulations do not exclude nonprofit entities, but do exclude noncommercial activity. The EB-5 regulations define “commercial enterprise” as:

any for-profit *activity* formed for the ongoing conduct of lawful business including, **but not limited to**, a sole proprietorship, partnership (whether limited or general), holding company, joint venture, corporation, business trust, **or other entity which may be publicly or privately owned**. . . . This definition shall not include a noncommercial activity such as owning and operating a personal residence.⁵⁶

The exclusion of noncommercial activity presupposes a distinction between *nonprofit* and *noncommercial*. The example given of noncommercial activity is “owning and operating a personal residence”⁵⁷—which is obviously a for-profit activity. Therefore, there must be a difference between nonprofit and noncommercial. The regulation uses the term “for-profit activity,” and not “for-profit entity.”⁵⁸ In limiting the commercial enterprise to for-profit activities, the regulation does not exclude nonprofit entities, but rather only excludes noncommercial activity, and

49. *Nonprofits Account for 11.4 Million Jobs, 10.3 Percent of All Private Sector Employment*, BUREAU LAB. STAT.: ECON. DAILY (Oct. 21, 2014), http://www.bls.gov/opub/ted/2014/ted_20141021.htm.

50. *Id.*

51. Erik Friesenhahn, *Nonprofits in America: New Research Data on Employment, Wages, and Establishments*, MONTHLY LAB. REV. (Feb. 2016), <https://www.bls.gov/opub/mlr/2016/article/nonprofits-in-america.htm>.

52. *Id.*

53. *Id.*

54. *See* Employment-Based Immigrants, 56 Fed. Reg. 60,897, 60,897–905 (Nov. 29, 1991).

55. *See id.* at 60,902. As stated earlier, this position is not dispositive because it is merely stated in the preamble to the regulations. *See supra* note 40 and accompanying text.

56. 8 C.F.R. § 204.6(e) (2017) (emphasis added).

57. *Id.*

58. *Id.*

requires for-profit activity. In other words, the regulations only exclude nonprofit entities to the extent that they engage in noncommercial activity and do not engage in for-profit activity.

The USCIS position that nonprofits do not engage in commerce is incorrect as a matter of law.⁵⁹ Nonprofit entities can, and do, participate in both for-profit and commercial activity.⁶⁰ The regulations do not exclude nonprofit entities that do engage in commerce from the definition of “commercial enterprise.”⁶¹ Just as some corporations do not engage in commercial activity (for example, those which merely own and operate a personal residence),⁶² this Note concedes that some nonprofits do not engage in commercial activity either. But some nonprofits do. There are several examples of nonprofit entities engaged in the same commercial activities as their for-profit counterparts: there are nonprofit wineries,⁶³ solar power companies,⁶⁴ schools,⁶⁵

59. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 585 (1997) (“Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in . . . commerce.”).

60. *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003) (noting that “non-profit entities may engage in commercial activity” (citing *Dedication & Everlasting Love to Animals v. Humane Soc’y of the U.S., Inc.*, 50 F.3d 710 (9th Cir. 1995))); *see also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 340–49 (1987) (concurring opinions) (questioning the constitutionality of tax exemptions relating to for-profit activities of nonprofit religious organizations, thus acknowledging the existence of nonprofit organizations’ for-profit activities).

61. *See* 8 C.F.R. § 204.6(e). From a tax perspective, nonprofits may engage in for-profit, commercial activity. *Treas. Reg. § 1.501(c)(3)-1(e)(1)* (2018); *see* FRANCES R. HILL & DOUGLAS M. MANCINO, *TAXATION OF EXEMPT ORGANIZATIONS* ¶ 21.02 (Thompson Reuters, 2017), Westlaw. The concern for nonprofits engaged in for-profit or commercial activity is that they may be taxed on the income from these activities (“unrelated business taxable income” or UBTI). *Id.* ¶ 21.03. Also, if a nonprofit engages in too much activity that triggers UBTI, it risks its nonprofit status. *See* *Treas. Reg. § 1.501(c)(3)-1(e)*; HILL & MANCINO, *supra*, ¶ 21.03 (“The regulation has spawned an extensive number of articles on the question of whether and to what extent a Section 501(c)(3) organization may engage in unrelated trade or business without jeopardizing its exemption.”). But nothing prevents nonprofits from engaging in for-profit, commercial activity. For example, in Revenue Ruling 73-104, a nonprofit museum sold greeting cards, and the issue was whether the income generated from the sale of those cards constituted unrelated business taxable income. *Rev. Rul. 73-104*, 1973-1 C.B. 263. The Treasury held that “[t]he fact that the cards are promoted and sold in a clearly commercial manner at a profit . . . does not alter the fact of the activity’s relatedness to the museum’s exempt purpose.” *Id.* A Revenue Ruling is an administrative ruling by the IRS that interprets the law and has the force of law. *Understanding IRS Guidance—A Brief Primer*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer> (last updated July 6, 2016).

62. 8 C.F.R. § 204.6(e).

63. Joe Becerra, *Ehlers Estate Winery*, WINE COUNTRY GETAWAYS (Apr. 1, 2007), <http://winecountrygetaways.com/ehlers-estate-winery>.

64. *Who We Are*, GRID ALTERNATIVES, <http://www.gridalternatives.org/about> (last visited Apr. 1, 2018).

65. Patricia Cohen, *Some Private Colleges Turn a Tidy Profit by Going Nonprofit*, N.Y. TIMES, Mar. 3, 2015, at A1.

clothing brands,⁶⁶ restaurants,⁶⁷ and even lenders.⁶⁸ No one would doubt, if incorporated as for-profit corporations, that these entities would be engaged in for-profit, commercial activity. So the question must be asked: Why arbitrarily and categorically exclude nonprofits?

In short, nothing in the regulations precludes a commercial enterprise from being a nonprofit entity. Rather, the problem is that USCIS lacks clarity about what constitutes commercial activity. Because neither the statute nor the regulations exclude nonprofit entities from the definition of “commercial enterprise,” they should be—they *are*—included.

C. *Areas of Employment-Based Immigration Law Permitting Nonprofit Participation*

In addition to the lack of any statutory or regulatory prohibition on including nonprofit entities, other areas of law—including employment-based immigration law—fail to distinguish between the for-profit and nonprofit sectors.⁶⁹ To illustrate, neither the Department of Labor in the context of labor certifications,⁷⁰ nor USCIS in the context of national interest waivers,⁷¹ draws any distinction for nonprofit entities.

The Department of Labor’s labor certification regulations⁷² define “employer” as:

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66. *Who We Are*, CLOTHE YOUR NEIGHBOR AS YOURSELF, <http://www.cyny.org/about/> (last visited Apr. 1, 2018).
67. Ginia Bellafante, *Gentrification Isn't on the Menu*, N.Y. TIMES, July 30, 2017, at MB1; Talia Ralph, *The Non-Profit Restaurant That Could*, FORBES (Oct. 6, 2015, 7:56 AM), <https://www.forbes.com/sites/taliaralph/2015/10/06/colors-non-profit-restaurant-that-could/#500c3d025729>.
68. *About Us*, GRAMEEN AM., <http://www.grameenamerica.org/about-us> (last visited Apr. 1, 2018); *About*, LIFTFUND, <http://www.liftfund.com/about/> (last visited Apr. 1, 2018); *About*, OPPORTUNITY FUND, <http://www.opportunityfund.org/about/> (last visited Apr. 1, 2018); *Who We Are*, VEDC, <https://vedc.org/about> (last visited Apr. 1, 2018).
69. See, e.g., Annie Clement, *Contemporary Trademark Law and Sport*, 12 J. LEGAL ASPECTS SPORT 1, 5 (2002) (“Intellectual property law treats for-profit businesses in the same manner as not-for-profit organizations.”); Joseph Mead & Michael Pollack, *Courts, Constituencies, and the Enforcement of Fiduciary Duties in the Nonprofit Sector*, 77 U. PITT. L. REV. 281, 284 (2016) (“[N]onprofit corporation laws typically mirror for-profit counterparts with little more than an occasional word substitution.”); David W. Barrett, Note, *A Call for More Lenient Director Liability Standards for Small, Charitable Nonprofit Corporations*, 77 IND. L.J. 967, 968 (“[L]egislatures have passed laws that hold directors of nonprofits to the same standards as directors of for-profits.”); see also *infra* notes 70–71 and accompanying text.
70. Subject to limited exceptions (including the EB-5 category), all foreigners intending to immigrate through the employment-based immigration process are inadmissible unless and until the Department of Labor certifies that their intended employment will not disrupt wages for U.S. workers in like positions in the relevant geographical area. 8 U.S.C. § 1182(a)(5)(A)(i) (2018).
71. This exception to the labor certification requirement is specific to the second preference employment-based immigration category, EB-2. 8 U.S.C. § 1153(b)(2) (2018). USCIS may waive the job offer requirement, which, in turn, waives the labor certification requirement, if USCIS deems the waiver to be in the national interest. *Id.* § 1153(b)(2)(B); see also Lenni B. Benson, *Breaking Bureaucratic Borders: A Necessary Step Toward Immigration Law Reform*, 54 ADMIN. L. REV. 203, 244–49 (2002).
72. The process of applying for a labor certification is called Program Electronic Review Management System (PERM). Benson, *supra* note 71, at 301–03.

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[a] person, association, firm, or a corporation that currently has a location within the United States to which U.S. workers may be referred for employment and that proposes to employ a full-time employee at a place within the United States, or the authorized representative of such a person, association, firm, or corporation.⁷³

As interpreted by the Board of Alien Labor Certification Appeals, this definition encompasses nonprofit entities, which means, therefore, that nonprofit entities may petition for permanent residence for their employees.⁷⁴ From this, we deduce that the Department of Labor considers bona fide job creation in the nonprofit sector to meet the requirements of the statute.

Similarly, national interest waivers are available to persons who will be employed in the nonprofit sector.⁷⁵ For example, in *Matter of Redacted*,⁷⁶ the Administrative Appeals Unit (AAU)⁷⁷ reversed the denial by the Nebraska Service Center (NSC) of a national interest waiver for an EB-2⁷⁸ applicant who was an “exceptional management consultant for a nonprofit management organization.”⁷⁹ The AAU reversed the NSC’s decision because the applicant’s employment was in the national interest⁸⁰: it was of no import that she would work in the nonprofit sector.⁸¹

73. 20 C.F.R. § 656.3 (2017).

74. *See, e.g.*, Crossroads Safehouse, Inc., 2000 BALCA LEXIS 44 (U.S. Dep’t of Labor Mar. 6, 2000) (denial *aff’d* on other grounds) (discussing a labor certification filed by a nonprofit organization); Dig. Freedom Inst., 2008 BALCA LEXIS 28 (U.S. Dep’t of Labor Mar. 25, 2008) (denial *aff’d* on other grounds) (discussing a labor certification filed by a nonprofit organization); Horizon Sci. Acad., 2007 BALCA LEXIS 41 (U.S. Dep’t of Labor Mar. 8, 2007) (denial *aff’d* on other grounds) (discussing a labor certification filed by a nonprofit organization); Samaritans of N.Y., Inc., 1998 BALCA LEXIS 390 (U.S. Dep’t of Labor June 2, 1998) (denial *aff’d* on other grounds) (discussing a labor certification filed by a nonprofit organization).

75. 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE, § 39.04 n.41 (Michael A. Bruno et al. eds., Matthew Bender & Co., Inc. rev. ed. 2017).

76. *See id.*

77. In 1994, Legacy INS consolidated the AAU with the Legalization Appeals Unit to establish the Administrative Appeals Office (AAO), which reviews appeals of negative immigration decisions. *The Administrative Appeals Office (AAO)*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao> (last updated Feb. 26, 2018). The AAO issues both nonbinding and binding precedent. *Id.*

78. An EB-2, or a second preference employment based immigration case, is an immigrant visa awarded to professionals with advanced degrees or exceptional abilities. 8 U.S.C. § 1153(b)(2) (2018). The EB-2 visa requires that applicants go through the PERM process, unless the the applicant’s line of work is deemed in the national interest by the Department of Labor. 8 C.F.R. § 204.5(k)(4)(i)–(ii) (2017).

79. 3 CHARLES GORDON ET AL., *supra* note 75; *see* Naomi Schorr, *They Don’t Shoot Elephants, Do They?: The National Interest Waiver for EB-2 Immigrants*, 70 INTERPRETER RELEASES (Thompson Reuters, St. Paul, Minn.), June 14, 1993, at 773, 776–77.

80. *See* 3 CHARLES GORDON ET AL., *supra* note 75.

81. *Id.*

For-profit and nonprofit entities are treated similarly in these areas of law, and nonprofits are even advantaged in one popular area of business immigration law: the H-1B nonimmigrant visa.⁸² The H-1B visa provides temporary work authorization for a professional.⁸³ There are 65,000 available H-1B visas each year,⁸⁴ less 6,800 reserved for “H-1B1” applicants—1,400 for Chilean nationals⁸⁵ and 5,400 for Singaporean nationals.⁸⁶ But various types of nonprofit entities can be exempt from the cap on H-1B visas⁸⁷: nonprofit research organizations and nonprofit entities related to or affiliated with higher education institutions may petition that their employees be unrestricted by the cap.⁸⁸ This implies that jobs in nonprofit entities are even more valuable to the United States than jobs in for-profit entities, which are subject to the cap.

With respect to nonprofit job creation in the EB-5 context, the USCIS position is at odds with its own position in analogous areas of business immigration law. Accordingly, because the statute and regulations permit the expansive view of including nonprofit entities in the definition of “commercial enterprise” and because other areas of business immigration law do not discriminate against the nonprofit sector, USCIS should embrace a broad definition of commercial enterprise, one that includes nonprofit entities in the EB-5 program.

82. See AUSTIN T. FRAGOMEN ET AL., H-1B HANDBOOK § 1:40 (2018 ed.).

83. See 8 C.F.R. § 212.2(h)(4)(iii)(A) (2017); LENNI B. BENSON ET AL., IMMIGRATION AND NATIONALITY LAW: PROBLEMS AND STRATEGIES 261 (2013).

84. 8 U.S.C. § 1184(g)(1)(A)(vii) (2018). An additional 20,000 visas are allotted for applicants who attained a master’s degree or higher in the United States. *Id.* § 1184(g)(5)(C).

85. *Id.* § 1184(g)(8)(B)(ii)(I).

86. *Id.* § 1184(g)(8)(B)(ii)(II). In the 2017 federal fiscal year, over 236,000 employees entered the lottery to be considered for one of the available visas. *USCIS Completes the H-1B Cap Random Selection Process for FY 2017*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017> (last updated Apr. 12, 2016); Sara Ashley O’Brien, *High-Skilled Visa Applications Hit Record High—Again*, CNN (Apr. 12, 2016, 9:29 PM), <http://money.cnn.com/2016/04/12/technology/h1b-cap-visa-fy-2017/>. Notwithstanding serious pushback from various tech companies, the number of H-1B visas available has not increased in over a decade. See, e.g., George Packer, *Change the World*, NEW YORKER (May 27, 2013), <http://www.newyorker.com/magazine/2013/05/27/change-the-world> (noting that while at a dinner with President Barack Obama in early 2011, Steve Jobs requested more H-1B visas); Robert Pear, *High-Tech Titans Strike Out on Immigration Bill*, N.Y. TIMES (June 25, 2007), <http://www.nytimes.com/2007/06/25/technology/25tech.html> (“Bill Gates and Steven A. Ballmer of Microsoft have led a parade of high-tech executives to Capitol Hill, urging lawmakers to provide more visas for temporary foreign workers and permanent immigrants who can fill critical jobs.”).

87. 8 U.S.C. § 1184(g)(5)(A)–(B).

88. *Id.*

III. CAPITAL PLACED AT RISK FOR THE PURPOSE OF GENERATING A RETURN ON THE CAPITAL PLACED AT RISK⁸⁹

The next hurdle to be cleared is the proposition that funds invested with donative intent into a nonprofit commercial enterprise are “at risk” for the purpose of the EB-5 regulations. This Note contends that these funds are indeed “at risk.”

The statute itself does not use either the term “at risk” or “return.”⁹⁰ Both terms were added by the regulations. The regulations use both terms in only one way—as an evidentiary component of the investment requirement.⁹¹ The regulations state: “[t]o show that the petitioner has invested . . . the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk.”⁹²

This requirement evidences the agency’s concern that the applicant engage in a bona fide contribution of capital to the commercial enterprise.⁹³ What this requirement proscribes is a risk-free investment—for example, holding funds in a corporate savings account and conducting minimal business activities.⁹⁴ This requirement also prohibits guaranteed returns and redemption agreements, whereby an EB-5 applicant is essentially guaranteed a return of his capital.⁹⁵

89. This language is from the regulations. 8 C.F.R. § 204.6(j)(2) (2017). It is unclear why the agency added the at-risk requirement twice—especially when the requirement is not in the statute. *See* 8 U.S.C. § 1153(b)(5) (2018). While not the argument asserted by this Note, an *ultra vires* argument might be made questioning the validity of the at-risk requirement.

90. *See* 8 U.S.C. § 1153(b)(5).

91. 8 C.F.R. § 204.6(j)(2); *see also* Lee, *supra* note 27, at 331.

92. 8 C.F.R. § 204.6(j)(2).

93. *See, e.g.*, Ho, 22 I. & N. Dec. 206, 210 (Admin. Appeals Office 1998) (illustrating the concern of USCIS with the at-risk requirement by holding that an applicant’s funds were not at risk because he presented no evidence that he would engage in business activity). In *Ho*, the AAO refused to overturn the USCIS denial of an EB-5 petition where the funds merely sat in an account with no activity. *Id.* The AAO held that the funds were not at risk because there was no “meaningful[,] concrete action” with respect to their use. *Id.* An investment with donative intent into a nonprofit commercial enterprise is the quintessential example of the at-risk requirement. In *Ho*, the concern of USCIS is that a return of capital was guaranteed because the petitioner held the funds in an account. *See id.* By contrast, in the context of the nonprofit commercial enterprise, there is a guarantee that an EB-5 applicant will not be returned her funds. The risk—whether a social value will be generated—is absolute: the funds will not be returned to the investor (thus redemption agreements do not make sense in this context). This disincentivizes the commercial enterprise from engaging in the problematic “*Ho* situation.” A 1998 case reviewing the Texas Service Center’s denial of a preference visa, *Izummi*, conflated this criterion with the job-creation requirement. *See* *Izummi*, 22 I. & N. Dec. 169, 189 (Bd. of Immigration Appeals July 13, 1998) (holding that “reserve funds . . . not available for the purposes of job creation . . . cannot be considered capital placed at risk.”).

94. *Ho*, 22 I. & N. Dec. at 210.

95. *Izummi*, 22 I. & N. Dec. at 189; Lee, *supra* note 27, at 332–35; *see also* *EB-5 Adjudications Policy*, *supra* note 13, at 5 (explaining that redemption agreements also violate the at-risk requirement).

The regulations state that the capital must be “at risk for the purpose of generating a return on the capital placed at risk.”⁹⁶ In a direct investment,⁹⁷ this simply means there is a legitimate business using the invested capital.⁹⁸ In the regional center (and other pooled EB-5 investments) context, the risk is also clear: Will the investor be repaid?⁹⁹ In other words: Will the project be successful enough to repay the investors? But, in the nonprofit context, the return on the investment is not monetary; the return is the utility—the social value of the investment. The at-risk requirement is met by the risk of the social value not being created. In this context, the at-risk requirement is: Will the venture create the desired social value?¹⁰⁰ In essence, the inquiry is the same: Will the venture be successful? The difference is in the meaning of “return.” This Note argues for a broad interpretation of the word: In addition to encompassing a pecuniary return, the term must also encompass a social return.¹⁰¹

96. 8 C.F.R. § 204.6(j)(2).

97. A “direct investment” is an EB-5 applicant’s investment of capital into his own business. *See* 8 C.F.R. § 204.6. By contrast, a regional center, *id.* § 204.6(e), is a pooled investment vehicle through which several EB-5 applicants invest funds into a common commercial enterprise, which is run by a third party. *See What is an EB-5 Visa?*, EB5 INV., <http://www.eb5investors.com/eb5-basics/what-is-eb5> (last visited Apr. 1, 2018). Most EB-5 applicants invest in regional centers. *Id.* (“Roughly 90 percent of all EB-5 applicants invest through a regional center.”). This is likely because of the “hands-off” approach it offers to investors. *Id.*; *see also* ILW.COM, *Introduction to FORMING AND OPERATING AN EB-5 REGIONAL CENTER: A GUIDE FOR DEVELOPERS AND BUSINESS INNOVATORS* 15–16 (Angelo A. Paparelli & L. Batya Schwartz Ehrens, eds., 2014–2015 ed.).

98. *See Ho*, 22 I. & N. Dec. at 206.

99. *See Izummi*, 22 I. & N. Dec. at 169.

100. The social impact of a nonprofit entity can be measured quantitatively. Sarah Ford, *Measuring the Impact and Success of a Nonprofit-Corporate Partnership*, AMERICA’S CHARITIES (Dec. 18, 2015), <https://www.charities.org/news/blog/measuring-impact-and-success-nonprofit-corporate-partnership>. The benchmarks used to analyze the success of a particular nonprofit entity would, of course, have to be tailored to the goals of that project. Examples include the number of trainings held, the number of persons assisted, the types of model materials developed, the number of performances held, and the outcomes in cases. *See Evaluation and Measurement of Outcomes*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/tools-resources/evaluation-and-measurement-of-outcomes> (last visited Apr. 1, 2018). Sophisticated investors in the nonprofit sector already require reporting and project outcomes as conditions of grants. *See id.* For example, Safe Passage Project, a *pro bono* initiative created by immigration professor Lenni B. Benson at New York Law School to assist unaccompanied minors in deportation proceedings, *see Our People*, SAFE PASSAGE PROJECT, <https://www.safepassageproject.org/who-we-are/our-people/#our-founder-LB> (last visited Apr. 1, 2018), has a grant that offers partial support. *See SAFE PASSAGE PROJECT*, 2015 ANNUAL REPORT 19 (2015), <https://www.safepassageproject.org/wp-content/uploads/2015/08/Safe-Passage-Project-2015-ANNUAL-REPORT.pdf>. The grant, from the New York City Council, requires monthly reports on case activity, assistance with school registration, health care enrollment, and any other relevant information, and mandates assistance to a minimum number children per year. *See id.* Grant reports and audits are a standard part of nonprofit management. *See* Scott Johnson, *How to Write a Grant Report*, SOCIAL SOLUTIONS, <http://www.socialsolutions.com/blog/how-to-write-a-grant-report/> (last visited Apr. 1, 2018); *Nonprofit Audit Guide*, NAT’L COUNCIL NONPROFITS, <https://www.councilofnonprofits.org/nonprofit-audit-guide> (last visited Apr. 1, 2018).

101. *See infra* Part III.

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The preamble to the final EB-5 regulations explains that the definition of “investment” in the regulations is modeled after the Department of State’s E-2 treaty investor regulations.¹⁰² The Department of State’s treaty investor regulations define “investment” as the “placing of capital . . . at risk in the commercial sense with the objective of generating a profit.”¹⁰³

First, USCIS should not mistake the profit-generating activity of the commercial enterprise with that of the EB-5 applicant. The regulation requires that the commercial enterprise be engaged in for-profit activity; however, there is no requirement that the applicant be engaged in her own for-profit activity.¹⁰⁴ There is a clear difference between an activity’s objective of generating a profit and an EB-5 applicant’s objective of generating a profit. The EB-5 applicant’s objective of generating a profit in fact *must* be irrelevant because it is typically impossible for EB-5 applicants to actually generate a profit.¹⁰⁵ Thus, USCIS need only concern itself with the for-profit qualities of the activity in which the commercial enterprise is engaged.

Second, even though the definition of “investment” in the EB-5 regulations is modeled after the definition of “investment” in the E-2 regulations, this does not mean that both regulations define the terms in the same way. In fact, they do not.¹⁰⁶

102. 56 Fed. Reg. 60,897, 60,904 (Nov. 29, 1991).

103. 22 C.F.R. § 41.51(b)(7) (2017).

104. 8 C.F.R. § 204.6(e) (2017) (defining commercial enterprise). Much to the contrary, EB-5 investments are not typically profit-driven; they exist for the purpose of attaining permanent residence in the United States. Charles C. Foster, *Immigration Options for Entrepreneurs Under U.S. Immigration Laws*, Hous. LAW., Nov.–Dec. 2016, at 20, 24–25. The vast majority of EB-5 applicants invest in a regional center; most regional center applicants lose money with EB-5 investments after accounting for legal fees, syndication fees, and the below-market returns on investment offered by substantially all regional centers, not to mention inflation and the opportunity cost of using money. See Qiang Bjornbak et al., *Immigration and Naturalization Law*, 46 INT’L LAW. 335, 342 (2012); Robert Rankey, *Citizenship for Sale: An Evaluation of the EB-5 Immigrant Investor Program After Twenty-Five Years of Iterations, Improvements, Kudos, and Consternation*, 40 SUFFOLK TRANSNAT’L L. REV. 357, 387 (2017); Sepandat Stephanie Tajick, *How Often is Principal Investment for an EB-5 Lost?*, QUORA: BLOG, <https://www.quora.com/How-often-is-principal-investment-for-an-EB-5-lost> (last updated June 23, 2017); *What is an EB-5 Visa?*, *supra* note 97. The assertion that EB-5 applicants must be personally engaged in profit-generating activity with respect to their investments is inconsistent with industry practice.

105. It is standard practice in the industry for regional centers to cap investors’ return on investment at less than one percent, non-compounded annually. See Echo Meisheng King, *The Application of EB-5 Direct Investment in a Restaurant*, EB5 INVS. (June 28, 2016), <http://www.eb5investors.com/magazine/article/eb5-direct-investment-restaurants>. When the opportunity cost of money is accounted for, not to mention any inflation, the notion that an EB-5 applicant must *personally* have a profit motive (as opposed to a mere desire to attain permanent residence) is nonsensical. See *supra* note 104 and accompanying text.

106. This should be no surprise, as the two programs are different in nature. Most E-2 investors live off of the businesses they start, see 8 C.F.R. § 214.2(e)(2)(i) (noting that E-2 investments cannot be “in a marginal enterprise solely for the purpose of earning a living”), while most EB-5 applicants invest in regional centers (and thus have no access to their monies or profits, if any, for years), living and working where they choose. See ILW.COM, *supra* note 97, at 17. Hence, the definitions of “investment” should be different to accommodate the differences between the two programs.

Because the drafters of the EB-5 regulations modeled the definition of “investment” after the E-2 regulations, we may infer that the drafters intended any differences between them, and that these differences are meaningful.¹⁰⁷

While the E-2 regulations use the term “profit” in defining “investment,”¹⁰⁸ the EB-5 regulations do not.¹⁰⁹ Therefore, the drafters intended a different (and arguably broader) use of “investment” as applied to EB-5, than as applied to E-2.¹¹⁰ The E-2 regulations say that the investment must be “at risk . . . with the objective of generating a profit,”¹¹¹ while the EB-5 regulations say that the investment must be “at risk for the purpose of generating a return.”¹¹² If the drafters of the EB-5 regulations modeled those regulations after the E-2 regulations, they could easily have used the same language.¹¹³ But they did not. Instead of using the word “profit,” which connotes pecuniary gain, they used the word “return,” which is a broader term, encompassing more.¹¹⁴ Accordingly, the EB-5 regulations allow for an investor to disregard her own profit-generating motives and focus on the return-generating goals of the commercial enterprise, whether that enterprise is a for-profit or nonprofit entity.

The idea of a non-monetary “return” on investment, or a “Social Return on Investment” (SROI) is widely accepted.¹¹⁵ SROI is “essentially a specialized cost-

107. In *Corning Glass Works v. Brennan*, the Court held that because Congress heard testimony that included the technical term “working conditions,” and then incorporated that term into the statute, Congress intended to adopt the technical meaning of the term in the statute. 417 U.S. 188, 201–03 (1974). Applying this logic, because USCIS looked at the Department of State’s at-risk requirement in the E-2 regulations when drafting the at-risk requirement in the EB-5 regulations, it could have simply adopted the same language—that is, it would have used the term “profit”—if it had wanted the EB-5 regulations to have the same meaning as the E-2 regulations. But by using a different term—“return”—we infer that USCIS intended a different at-risk requirement.

108. 22 C.F.R. § 41.51(b)(7) (“Investment means the treaty investor’s placing of capital, including funds and other assets, at risk in the commercial sense with the objective of generating a *profit*.”) (emphasis added).

109. See 8 C.F.R. § 204.6(j)(2).

110. *Supra* note 107 and accompanying text.

111. 22 C.F.R. § 41.51(b)(7).

112. 8 C.F.R. § 204.6(j)(2).

113. *Supra* note 107.

114. Compare *Profit*, DICTIONARY.COM, <http://www.dictionary.com/browse/profit?s=t> (last visited Apr. 1, 2018) (defining profit as a “pecuniary gain resulting from the employment of capital in any transaction”), and *Profit*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/profit> (last visited Apr. 1, 2018) (defining profit as “money that is made in a business”), with *Return*, DICTIONARY.COM, <http://www.dictionary.com/browse/return> (last visited Apr. 1, 2018) (defining return as “reciprocation”), and *Return*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/return?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Apr. 1, 2018) (defining return to mean “something given in repayment or reciprocation”).

115. See, e.g., Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board’s Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 647–54 (2007). SROI even has its own *Wikipedia* page, which defines SROI as “a principles-based method for measuring extra-financial value (i.e., environmental and social value not currently reflected in conventional financial accounts) relative to resources invested. It can be used by any entity to evaluate impact on stakeholders, identify ways to improve performance, and enhance the performance of

benefit analysis” pioneered by the Roberts Enterprise Development Fund, a venture philanthropy fund, in the 1990s.¹¹⁶ It is a measurement of the extra-financial value, or the social, environmental, and economic value, created by an organization.¹¹⁷

Generally, if an investor gets utility out of something (e.g., environmentally sustainable practices of a business) other than a monetary return on his investment, the investor’s total return on investment includes both the monetary return and the value of that additional item. Thus, as the corporate social responsibility literature discusses, such an investor may be willing to accept a lower monetary return on his investment than he would in the absence of the non-monetary item. The Green Bay Packers provide a stark example of this phenomenon in the NFL. The Packers recently completed its fifth public offering of stock, offering shares of Packer stock at \$250 per share and adding more than 250,000 new shareholders. The offering documents stated that investors should not expect any monetary return on this investment; the Packers do not pay dividends, and if an owner wishes to sell his stock, he must offer it for sale first to the Packer organization for just pennies. Given these terms, each person who subscribes for Packer stock must believe that the non-monetary return (e.g., the pride of being a fan-owner) is sufficiently valuable to justify investing in the team, even without the prospect of receiving any financial return on the investment.¹¹⁸

In the above excerpt, the examples given of “utility”—the SROI—are a business (1) becoming environmentally sustainable, and (2) having team pride.¹¹⁹ Any social value that the investor is willing to accept in return for his contribution of capital should suffice.¹²⁰

A recent trend in state corporate law evidences the business world’s embrace of SROI.¹²¹ Several states have enacted statutes allowing for incorporation as a benefit

investments.” *Social Return on Investment*, WIKIPEDIA, https://en.wikipedia.org/wiki/Social_return_on_investment (last visited Apr. 1, 2018).

116. Alice Hohler, *Measuring the Bang of Every Donated Buck*, WALL STREET J. (Mar. 1, 2010, 12:01 AM), <http://www.wsj.com/articles/SB10001424052748703787304575075340954767332>.

117. See Janet E. Kerr, *The Creative Capitalism Spectrum: Evaluating Corporate Social Responsibility Through a Legal Lens*, 81 TEMP. L. REV. 831, 868 (2008).

118. Heather M. Field, *Throwing the Red Flag: Challenging the NFL’s Lessons for American Business*, 38 J. CORP. L. 381, 394 (2012).

119. *Id.*

120. See Kerr, *supra* note 115, at 652–53. Philanthropic goals are increasingly accepted as valid business purposes. Many states have authorized benefit corporations, which both serve their shareholders and promote social goals. See Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES: COMMUNITY VOICE (May 30, 2014, 9:00 AM), <http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/#5c10e0bd6ea3>; *infra* note 124 and accompanying text.

121. See Sarah Murray, *Benefit Corporations: Social Missions*, FIN. TIMES (May 17, 2012), <https://www.ft.com/content/23328000-9b42-11e1-8b36-00144feabd0>.

corporation¹²². For example, Delaware’s benefit corporation statute defines a “public benefit corporation” as:

a for-profit corporation . . . that is intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner. To that end, a public benefit corporation shall be managed in a manner that balances stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or benefits identified in its certificate of incorporation.¹²³

In other words, the return given to stockholders of benefit corporations includes SROI; the corporation has a legal obligation to use its resources to create social value.¹²⁴

Lastly, a broad definition of “return” is already embraced in the EB-5 context. Most EB-5 applicants invest in a pooled investment vehicle, or regional center.¹²⁵ These regional centers typically offer exceptionally low rates of return—often capped at less than one percent, non-compounded annually.¹²⁶ These investments are also high-risk.¹²⁷ Investors accept these high-risk, low-return investments in consideration of the regional center providing a mechanism through which investors will hopefully attain permanent residence.¹²⁸ Therefore, the value of attaining permanent residence is already part of the investors’ return.¹²⁹ Especially since a broad interpretation of “return” is already accepted, USCIS should embrace the concept of social return.

With a broad definition of “return,” the at-risk requirement is easily met. Provided the funds are used to achieve a social value that may or may not come to fruition, the funds are “at risk” within the meaning of the EB-5 regulations.

122. *E.g.*, CAL. CORP. CODE § 14602 (West 2012), DEL. CODE ANN. tit. 8, § 362 (West 2015); N.Y. BUS. CORP. LAW § 1701 (McKinney 2012). There are currently thirty-four states that have passed benefit corporation statutes. *State by State Status of Legislation, BENEFIT CORP.*, <http://benefitcorp.net/policymakers/state-by-state-status> (last visited Apr. 1, 2018).

123. Tit. 8, § 362.

124. *See, e.g., id.* § 365(a); N.Y. BUS. CORP. LAW § 1706; *cf. id.* § 1707 (explaining that directors must “consider” the effects of any corporate action upon, *inter alia*, the ability of the benefit corporation to accomplish its public benefit purpose(s), but is not *required* to give priority to that interest over the pecuniary interests of its shareholders). There are currently over 1,600 benefit corporations in the United States. Ben Schiller, *Should Your Company Be A Benefit Corporation, A B Corp, or What?*, FAST COMPANY (Mar. 27, 2017) <https://www.fastcompany.com/3069192/should-my-company-be-a-benefit-corporation-a-b-corp-or-what>. Others have also advocated for the socially responsible use of EB-5 capital. Howard Patrick Barry, *EB-5 as an Instrument of Sustainable Capitalism*, 16 VT. J. ENVTL. L. 66, 118 (2014) (arguing that EB-5 should be used to solve a water pollution problem).

125. *Supra* note 97 and accompanying text.

126. *Supra* note 105 and accompanying text.

127. *See* Peter Elkind & Marty Jones, *The Dark, Disturbing World of the Visa-for-Sale Program*, FORTUNE (July 24, 2014), <http://fortune.com/2014/07/24/immigration-eb-5-visa-for-sale/>.

128. *See supra* note 104 and accompanying text.

129. Email from Sam Newbold, EB-5 Associate, Barst Mukamal & Kleiner LLP, to author (Jan. 30, 2015, 5:25 PM) (on file with author).

IV. CONCLUSION

The EB-5 statute and regulations do not exclude nonprofit entities from the definition of commercial enterprise, so they are included. While the preamble to the regulations indicates the agency's intention to exclude nonprofit organizations, nonprofits were not, in fact, excluded by the regulations. Furthermore, the regulations exclude noncommercial activity, but not nonprofit entities, thereby leaving room for nonprofit entities engaged in commercial activity. Other areas of business immigration law, such as PERM, National Interest Waivers, and H-1B, encompass—and may even advantage—nonprofit entities.

Additionally, funds contributed to a nonprofit commercial entity with donative intent are “at risk” within the meaning of the regulations because “at risk” is defined more broadly for EB-5 purposes than for E-2 purposes, which in turn allows for the concept of SROI. State benefit corporation statutes are demonstrative of a business trend to include social considerations in the idea of what constitutes a return on invested capital.

The Chief of the Immigrant Investor Program, Nicholas Colucci, stated at an EB-5 trade conference in May of 2014, that one of the aspects he admires most about the program is how “the resources that can be brought to bear across the interagency community, particularly in coordination with not-for-profit . . . entities, can be extremely powerful when focused and coordinated.”¹³⁰ In light of this view, USCIS should heed the AAO's advice to grow and benefit from experience¹³¹ and expand on its narrow construction of “commercial enterprise.” The nonprofit commercial enterprise is compliant with the EB-5 regulations, and therefore should be adopted by USCIS.

130. Nicholas Colucci, Chief, Immigrant Inv. Program, USCIS, Prepared Remarks to the Association To Invest in the United States (IIUSA) at the EB-5 Regional Economic Development Advocacy Conference (May 19, 2014), <https://www.uscis.gov/tools/resources-congress/testimonies-and-speeches/prepared-remarks-nicholas-colucci-chief-immigrant-investor-program-uscis>.

131. Izummi, 22 I. & N. Dec. 169, 196 (Bd. of Immigration Appeals July 13, 1998) (“To say that an agency's knowledge cannot grow, and that an agency is prohibited from benefiting from its experience, is unreasonable.”).